No. 6165

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA (a corporation),

Appellant,

vs.

BELVA FORREST and RONALD CLAUDE FORREST (a minor), by Belva Forrest, his guardian ad litem,

Appellees.

BRIEF ON BEHALF OF APPELLANT.

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FACTS.

The Complaint.

This action was commenced by the widow and minor child of Claude E. Forrest, upon an automobile insurance policy issued by appellant. The complaint alleges, that:

Claude E. Forrest met his death August 8, 1926, when struck by an automobile driven by Roy Hooper, belonging to Mrs. Mary C. Kittredge. At the time of the accident the said policy of insurance was in full force. (Tr. p. 3.)

On March 22, 1928, appellees obtained a judgment against said Roy Hooper in the sum of $5324.00, which was not paid; that at the time of said accident said Roy Hooper was operating said automobile in the course of his employment for Mrs. Kittredge. (Tr. p. 5.)

The policy contained, under terms "Additional Insured" what is known as Section "A" (Tr. p. 3), which provides as follows:

> "It is understood and agreed, unless limited by endorsement attached hereto, that this policy is extended to cover as additional Assured, any person, or persons riding in or legally operating any automobile described in the Declarations, and any person * * * legally responsible for the operation thereof * * * provided such use or occupation is with the permission of the named Assured * * *."

The Amended Answer.

The appellant admits the existence of the policy but denies that Hooper at the time of the accident was operating the automobile in the course of his employment for Mrs. Kittredge, the named assured. (Tr. p. 18.)

Appellant denies that Hooper was an insured of appellant (Tr. p. 20); appellant then pleads the section of its policy requiring it to be notified and to receive all process or pleadings and that the assured would cooperate in the defense of any suit (Tr. p. 21); and that Hooper did not forward to appellant, after receipt, any pleading relating to this accident; that he suffered a default judgment to be entered against

him, without notifying the appellant and that he failed to cooperate with the appellant in the defense of said action. (Tr. pp. 22-23.)

After trial by jury, a verdict for plaintiff was rendered in the full amount prayed, namely $5334.00. (Tr. p. 27.)

The Evidence.

It appears from the evidence that on August 8, 1926, Hooper was employed by Mrs. Kittredge as a chauffeur at her ranch at Saratoga. It was Saturday afternoon, about four thirty P. M. of said day that he asked Mrs. Kittredge to be released for the rest of the day, said he was going to a San Francisco theatre, and asked her permission to take the automobile to San Francisco. He testifies that she granted him this permission. That the nurse gave him a package to deliver to the Fairmont Hotel, but does not know to whom it was to be delivered, or what was its contents, or its size, or whether it was a package for Mrs. Kittredge or for the nurse and that he delivered it to a bell hop at the hotel, and took no receipt therefor, and that Mrs. Kittredge gave him no directions as to the delivery of this package. (Tr. pp. 30, 33, 35, 37, 40.) After visiting the theatre, he started to return to Saratoga, and on Sunday morning, August 9, 1926, at about 2:30 o'clock, near Atherton, he had the accident which caused the death of Mr. Forrest. (Tr. p. 32.)

After the accident Hooper tended the injured man and at about 5:30 or 6:30 returned to the home of one Joe Bargas, at Saratoga, who was the gardner for

Mrs. Kittredge; reported the accident to the gardner, and told him that Mrs. Kittredge did not know that he had taken the automobile. (Tr. p. 78.) Hooper, however, denies having made this statement. (Tr. p. 40.) Hooper remained at the gardener's house for an hour or two, and then returned to the ranch, which was about three-quarters of a mile away. (Tr. p. 40.)

The following day, an investigator of the appellant insurance company called on Hooper, after his appearance before the Coroner's jury, at Palo Alto, and took from Hooper a signed statement wherein Hooper traced his actions the evening of the accident. This statement, signed by Hooper, was offered in evidence, and marked Defendant's Exhibit "A." (Tr. p. 43.) Among other things, in that statement, told the investigator, is found the following: that Hooper "went to San Francisco in pursuit of my own purposes, which consisted of business and pleasure." (Tr. p. 43.) On October 13, 1926, the appellees filed suit in the Superior Court of the State of California, in and for the County of San Mateo (Tr. p. 3), against Roy Hooper, Mrs. E. H. Kittredge—thereafter Walter Perry Johnson was substituted as executor of the estate of Mrs. Kittredge (Mrs. Kittredge having died October 20, 1926) (Tr. p. 74), and thereafter a dismissal against said Walter Perry Johnson, as such executor, was ordered on February 11, 1927. (Tr. p. 31.)

Roy Hooper was served with process in that action in the Superior Court, on March 28, 1927, and on March 2, 1928, appellees in that action requested the default of Roy Hooper (Tr. p. 31) and on May 5, 1928, a default judgment was entered in favor of Belva

Forrest and Donald Claude Forrest, a minor, in the Superior Court of San Mateo County, against Roy Hooper in the sum of $5333.00, which amount Hooper did not pay. (Tr. p. 29.)

Robert W. Forsyth, manager of the Coast Department of the appellant, testified that he had access to all of the files in the office concerning the matter in question; he produced a copy of the policy (the original having been destroyed by the executor of Mrs. Kittredge) and then testified that he was never notified by Roy Hooper, that process had been served upon Roy Hooper in the said action pending in the Superior Court of San Mateo County. (Tr. pp. 54-67.)

E. E. Cresswell, on behalf of the appellant testified that he was Pacific Coast Claims Manager of the appellant, and was familiar with the matters in question. Subsequent to the service of process upon Roy Hooper, Hooper did not confer with said Cresswell, and never delivered a copy of the said process in said Superior Court action. (Tr. p. 80.)

A. L. Crawford, one of the witnesses for appellee, and one of their attorneys of record testified (Tr. p. 82) that after service of process upon Hooper, he spoke with Mr. Gus L. Baraty, one of the attorneys of record for the appellant in this action, advising him of said service, but the said Mr. Baraty told him that he was not concerned with the matter. In passing we might say that this evidence was given over the objection of appellant.

This action was instituted and maintained by Belva Forrest and her minor child. At the outset of the case,

it was stipulated that they were the heirs of the decedent (Tr. p. 28); it was further stipulated that said Claude E. Forrest was the father of the child named, and the husband of the widow. (Tr. p. 32.)

Belva Forrest was called as a witness in rebuttal by appellant and testified as follows (Tr. p. 81): She first answered to the name of Belva Forrest, and when again asked what her name was at that time, she said Belva Dovan. She then stated that she had just prior to that time told the clerk of the Court that her name was Belva Forrest, and then again stated that her name was Belva Dovan, and spelled the name D-O-V-A-N; that she had been remarried, and was now living with her new husband, whose occupation was that connected with the Shell Oil Company at Martinez, and that she had been married since July 12, 1929. A motion was then made by appellant for permission to interrogate the jury, as to whether any of the gentlemen of the jury were acquainted with the lady's present husband or were in any way connected with the concern with whom he was employed. This motion was denied.

APPELLANT'S CONTENTIONS.

1. That Roy Hooper failed to forward to the appellant the process which was served upon him in the Superior Court of San Mateo County, in which action a default judgment was taken against him.

2. That Roy Hooper failed to render to appellant any cooperation or assistance in the defense of said Superior Court action.

3. That the evidence is insufficient to establish the fact that Roy Hooper was legally operating said automobile with the permission of the named assured, Mrs. Kittredge.

4. That the evidence is insufficient to establish the fact that said Roy Hooper was operating said automobile in the course of his employment as chauffeur by said Mrs. Kittredge, as alleged in the complaint.

5. That instructions requested by appellant should have been given and instructions given by the Court should not have been given.

6. That appellant should have been granted permission to interrogate the jury after the discovery of the fact that the widow had remarried, or that a mistrial should have been directed by the Court.

7. A directed verdict in favor of appellant should have been granted.

8. That appellant's motion for a new trial should have been granted.

9. Defendant's Exhibit "C," for identification, should have been admitted in evidence.

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1. **THAT ROY HOOPER FAILED TO FORWARD TO THE APPELLANT THE PROCESS WHICH WAS SERVED UPON HIM IN THE SUPERIOR COURT OF SAN MATEO COUNTY, IN WHICH ACTION A DEFAULT JUDGMENT WAS TAKEN AGAINST HIM.**

The policy issued by appellant protects, within its terms, the named assured, Mrs. Kittredge, or an additional assured, Roy Hooper (assuming he was operat-

ing the automobile on her behalf or with her permission). The policy, Defendant's Exhibit "B" (Tr. pp. 55-63), under the title "This Agreement is Subject to the Following Conditions" (Tr. p. 56), contains paragraph "D." (Tr. p. 59.) Paragraph "D" comes under the head of "Notice and Settlement," and provides as follows:

> "In the event of accident the assured shall give prompt written notice thereof to the company or to one of its duly authorized agents and (one) forward to the company forthwith after receipt thereof every process, pleading or other paper of any kind relating to any and all claims, suits or proceedings."

This paragraph applies to Roy Hooper who, if operating the automobile for the named assured, or with her permission, was an additional assured under the terms of the policy, paragraph "A" thereof. (Tr. p. 58.)

The evidence is without contradiction that Hooper never delivered to this appellant a copy of the summons and complaint in the Superior Court action, but permitted a default judgment to be entered against him. The record shows that on March 28, 1927, Hooper was served with this process and failed to send the same to appellant and that on March 2, 1928, nearly one year after, his default was entered. No attempt was made by Hooper or anyone else to deny or contradict the testimony of the officers of the appellant to the effect that this important provision of the policy was not complied with. This point has been

directly passed upon by this Court in the recent case of

Metropolitan Cas. Ins. Co. N. Y. v. Colthurst, 36 Fed. (2nd) 559; affirmed 281 U. S. 746.

In the cited case, the policy provided (p. 560):

> "and if suits are brought to enforce such a claim the assured shall immediately forward to the company every summons, or other process, as soon as same shall have been served on him."

Process was not sent by the assured in the cited case to the insurance company, and default judgment was obtained just as in the case at bar.

In passing on this question, this Court, at page 561, said:

> "Appearing, appellant in its answer set up, among other defenses, the facts of Harris' failure to forward the summons and complaint in the Napa County suit. * * * The important consideration was that appellant should be advised of the service of process so that it could appear in response thereto, in the assured's name, and make defense. * * * In that view, admittedly, because of his default in not sooner forwarding the summons and complaint, Harris in case he had satisfied the judgment against him, could not have recovered upon the policy, and the question is whether or not, for like reasons, appellee is subject to the same disability. * * * While not all legally identical with the case before us, in principle and logically, we think these cases lend support to the appellant's contention that the injured person is under the same disability to which the insured would be subject should he pay the

judgment and seek indemnity under the policy. * * * The rule, as applied in some of the cases cited, is not without harsh consequences to the injured party. By the carelessness or wilful inaction of the insured, who is presumptively antagonistic one who has a just claim for damages may be defeated without any fault upon his part. Whether in such case the standing of the injured party is no better than that of the delinquent insured we need not here determine."

The point, however, was definitely determined by this Court in the recent case of

Royal Indemnity Co. v. Morris, 37 Fed. (2nd) 90, at p. 92.

At page 92 of that opinion, this Court said:

"That being true, the question remains whether the appellee (the injured third party) is in any better position. This question was expressly reserved in the Colthurst case (supra), but it now becomes necessary to decide it. Upon consideration, we feel constrained to answer it in the negative. Such is the weight of authority as appears from the citations in the Colthurst case. And see, also, Coleman v. New Amsterdam Casualty Co., 247 N. Y. 271, 160 N. E. 367, 369. Speaking of a statute of New York to which the provision of this policy in favor of the injured person conforms the Court of Appeals of New York in the Coleman case said: 'This statute was prompted by a definite mischief. * * * Before its enactment, the insolvency of the assured was equivalent in effect to a release of the surety. The policy was one of indemnity against loss suffered by the principal, and loss to him there was

none if he was unable to pay. The effect of the statute is to give to the injured claimant a cause of action against an insurer for the same relief that would be due to a solvent principal seeking indemnity and reimbursement after the judgment had been satisfied. The cause of action is no less but also it is no greater. Assured and claimant must abide by the conditions of the contract.' We can see no escape from the reasoning of this and the other cases referred to in which a similar conclusion is reached, and it is equally applicable to the California statute. If the protection afforded by the statute is inadequate, that is a consideration for the Legislature and not for the Courts."

A material condition of the policy was violated, there can be no question that Hooper forfeited whatever rights he had under the policy.

Royal Indemnity v. Morris, supra.

The appellant, insurer, cannot be held liable beyond the terms of its insurance contract.

36 *Corpus Juris,* 1084.

There is some testimony in the record (Tr. p. 82) from A. L. Crawford, one of the attorneys for appellees, regarding a conversation had with Mr. Baraty three or four days after process had been served on Hooper. Mr. Crawford stated that process was served, about the 30th of January, 1928 (Tr. p. 82), while the records of the county clerk at San Mateo County show that process was served on Hooper March 28, 1927. (Tr. p. 31.) Mr. Crawford testifies that he told Mr. Baraty, one the attorneys of record

in this case, in the City Hall in San Francisco, of the service of process on Hooper, and that he was told by Mr. Baraty that he, Baraty was not interested. There is further testimony that before the default, Mr. Crawford had a conversation with Mr. Cresswell, Claims Manager of the appellant, who was a witness in this case.

As to the conversation with Mr. Baraty, we contend that the testimony was immaterial and inadmissible, as Mr. Baraty was not an officer of the appellant; the action against the named assured, Mrs. Kittredge, had been dismissed February 11, 1927 (Tr. p. 31), and under the opinion in the case of *Metropolitan Casualty Insurance Company of New York v. Colthurst,* supra, conversation with Attorney Baraty was inadmissible.

As far as the interview with Mr. Cresswell, Claims Adjuster of the appellant, no summons was ever delivered to him at the conversation, and considering the long delay between the service on Hooper and his default—nearly one year—it would seem to indicate that Mr. Crawford realized that Mr. Hooper had failed to comply with the terms of the policy, and that Mr. Crawford was trying to arrange a settlement. These interviews were denied by Mr. Cresswell.

The fact remains that the provision of the policy of appellant requiring that summons be delivered to it, was never complied with at all, and under the cited decisions of this Court, appellees are without remedy against appellant.

2. THAT ROY HOOPER FAILED TO RENDER TO APPELLANT ANY COOPERATION OR ASSISTANCE IN THE DEFENSE OF SAID SUPERIOR COURT ACTION.

The policy of appellant under the title "this agreement is subject to the following conditions" contained the following provisions in paragraph D. (Tr. p. 60.) "The assured shall at all times render to the Company all cooperation and assistance in his power and whenever requested shall aid in securing information and evidence and the attendance of witnesses and in prosecuting appeals."

The evidence is without contradiction that Roy Hooper after he was served with process failed to cooperate with this appellant in any manner whatsoever. Not only did he fail to notify appellant of service upon him of process but he allowed default judgment to be taken against him; he did not advise appellant of his address or whereabouts, nor did he do anything which would tend to assist appellant in the defense of that Superior Court action, and there is not one word of denial by Hooper or any one else to the testimony of the officials of appellant of this failure to cooperate.

Again, we say a material condition of this policy was violated and a forfeiture of whatever rights Hooper had thereunder occurred. The question of failure to cooperate has been recently decided by this Court in the case of

> *Royal Indemnity Co. v. Morris,* 37 Fed. Reports. 2nd 90, decided December 17, 1929, rehearing denied, January 29, 1930, affirmed 281 U. S. 748.

As a coincidence, Joseph A. Brown, one of the attorneys for the appellee in the case at bar, was the attorney for the appellee in the cited case.

The policy in the cited case provided "in the event of claim or suit covered by this policy the insured shall in no manner aid or abet the claimant but shall cooperate fully with the company, the Royal Indemnity Company, in the defense of such claim or suit."

The facts of the cited case were that Gomez, the driver who was in the same position as Hooper in the case at bar had failed to deliver the summons to the insurance company and had failed and refused to authorize or permit the insurance company to appear in his behalf in the defense of the action.

This Court in passing on this subject stated "upon the assumption that Gomez, as we hold, was an 'insured' it must be conceded, under the facts stipulated, that he violated a material condition of the policy in declining to permit any defense to be made to the action brought against him by the appellee * * *." This Court then determines that Gomez having forfeited his rights under the policy any person claiming through him likewise forfeited his rights.

Hooper in the case at bar under the provisions of the policy was under obligation to assist in whatever manner possible in the defense of said Superior Court action. He could not arbitrarily or unreasonably decline to assist in making any fair or legitimate defense, and as said by this Court in the last cited case: He could have at least legitimately challenged the amount

of the alleged damages and the proof required. This is made evident by the fact that in the complaint filed in the Superior Court of San Mateo County $10,000.00 was demanded as damages (Tr. p. 3) while in the default judgment obtained in that Superior Court, damages were allowed in the sum of $5324.00 and costs. (Tr. p. 29.) Under this heading we contend that the provision of the policy of appellant requiring co-operation on the part of insured or those benefited by the policy, was not complied with in any particular and that therefore the action against appellant must fall.

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3. THE EVIDENCE IS INSUFFICIENT TO ESTABLISH THE FACTS THAT ROY HOOPER WAS LEGALLY OPERATING SAID AUTOMOBILE WITH THE PERMISSION OF THE NAMED ASSURED, MRS. KITTREDGE.

Under this head, at the outset, we desire to point out that the complaint in the case at bar against the appellant is not based upon the proposition, that Hooper was operating this automobile with the permission of the named assured, Mrs. Kittredge. See Tr. p. 5, where in Paragraph VII of the complaint, it is alleged "that on or about the 8th day of August, 1926, the aforesaid automobile of Mary C. Kittredge * * * was maintained, managed and operated by one Roy Hooper, a chauffeur while in the course of his employment as chauffeur by said Mary C. Kittredge." The only testimony in the record with regard to any permission to use the automobile in question given by Mrs. Kittredge appears in the cross-examination of

witness Roy Hooper (Tr. p. 37), where the following testimony was given:

"On the 8th day of August, 1926, I had a conversation with Mrs. Kittredge at her residence; I asked her permission to go to the City and asked her if I could be released and if she wanted me for anything else; it was in the livingroom of her house on the ground floor; on that Saturday afternoon I asked her if she needed me anymore for the rest of the day and she said 'No;' I asked her 'May I go to the City,' and she said 'Yes.' Previously to that I turned and asked her if it was quite all right to use the Buick, and she said 'Yes, but be careful.' "

This is the only testimony in the record which would at all tend to show that Roy Hooper had permission to use this automobile at the time of the accident. It was hearsay testimony and at the time it was given Mrs. Kittredge had long since died. This testimony therefore could not be contradicted by her. It was self-serving.

Opposed to that testimony as to permission is the signed statement of Hooper himself given the day after the accident, to the effect that he had gone to San Francisco.

"On the afternoon of August 7th, this year, I asked permission of my employer, Mrs. Mary C. Kittredge for release from work for the rest of the day. She granted me this. I did not ask her permission to use either of her new automobiles and she did not instruct me not to use them. Whether or not she knew I had the automobile, I do not know, except that she

knew early Sunday morning when the accident was first reported to her.

* * * * * * *

I left my employer's place about 4 P. M. August 7th, 1926, in her Buick car and went to San Francisco in pursuit of my own purposes, which consisted of business and pleasure." (Tr. p. 43.)

There was further testimony of the gardener Bargass, to whom Hooper stated that Mrs. Kittredge did not know that he had taken the car. (Tr. p. 78.) There is the further circumstance that at the time of the present trial, there existed an unsatisfied judgment against Roy Hooper, in the Superior Court of San Mateo County in the sum of over $5000.00 as the result of this accident. It is our contention that hearsay evidence of this kind cannot be too carefully scrutinized by the Court and jury. It has been stated that this type of evidence is the most dangerous species of evidence that can be admitted in a Court of justice, and the one that is most liable to abuse. No matter how honest the witness may be the exact words in which statements are made are often times transposed and entirely different meanings conveyed. The slightest mistake of recollection may totally alter the admission or declaration, and more than this it is most unsatisfactory evidence on account of the facility with which it may be fabricated and impossibility, generally of contradicting it.

The Supreme Court of the State of California has oftentimes characterized hearsay testimony purporting to come from the lips of a deceased person as the weakest and most unsatisfactory type of evidence,

and that the ends of justice demand that such testimony should be satisfactorily corroborated.

On this subject, the *Estate of Emerson,* 175 Cal. 724, at p. 727, we find the following language:

> "This unsupported evidence of an oral agreement, made in the presence of nobody and evidenced by no writing, the court accepted to the fullest extent and ruled accordingly. It did this we regret to state in violation of positive law and against the overwhelming weight of the countershowing.
>
> "This subject matter, as indicated, falls under two heads: First, the weight of the evidence itself, assuming its admissibility; and, second, the question of its admissibility. First as to the weight of evidence. Preliminarily it is to be noted that the evidence is self-serving in that it exonerates the witness giving it from a liability to the estate of his deceased brother in the sum of nine thousand dollars with interest, which liability, saving for his own testimony, is fixed against him. Second, the evidence is of oral admissions against interest by a man whose lips are sealed in death. What, then, does the law say of such evidence (assuming now its admissibility)? The Code of Civil Procedure declares (section 2061, subdivision 4) that 'the evidence or oral admissions of a party ought to be received with caution by the jury.' In Mattingly v. Pennie, 105 Cal. 514, (45 Am. St. Rep. 87, 39 Pac. 200), this court in Bank said, 'No weaker kind of testimony could be produced.' Again in Bank (Austin v. Wilcoxson, 149 Cal. 24, (84 Pac. 417)) this court has said: 'It is not stating it too strongly to say that evidence so given under such

> circumstances must appear to any court to be in its nature the weakest and most unsatisfactory.' Says Lord Romilly, Master of the Rolls in Couch v. Hooper, 16 Beav. 182: 'It is always necessary to remember that in these cases, from the nature of the evidence given, it is not subject to any worldly sanction, it being obviously impossible that any witness should be convicted of perjury for speaking of what he remembers to have been said in a conversation with a deceased person.' Therefore, proceeds the learned judge, he has never experienced any difficulty in rejecting and disregarding such evidence. And, as Vice-Chancellor Van Fleet of New Jersey said (Lehigh Coal & Nav. Co. v. Central R. R. Co., 41 N. J. Eq. 167, (3 Atl. 134)) speaking of such witnesses as this special administrator: 'It is obvious that their position in the case makes it the duty of the court to examine their testimony with a jealous care and to scan it with a watchful scrutiny. They are masters of the situation and swear without fear of contradiction * * * The safe administration of justice demands that in such a case there should be either satisfactory corroborative evidence, or that the evidence of the living party should be so full and convincing as to persuade the court of its entire truth.' And finally, the text writers show that the courts are all in accord in thus weighing such evidence, and here suffice it to cite 2 Moore on Facts, secs. 877, 150 and 1166; 1 Taylor on Evidence, sec. 648; Wigmore on Evidence, secs. 578, 2065."

The very recent case of *Smellie v. S. P. Co.,* 79 Cal. Dec. 316, decided April 1, 1930, at page 324 of that decision the following language is used:

"A third inherent weakness to be found in the testimony of Ireland is that it purports to give the statements or declarations of a deceased person. Regarding testimony of this character, this Court said: 'The evidence is of oral admissions against interest by a man whose lips are sealed in death. What, then, does the law say of such evidence (assuming now its admissibility)? The Code of Civil Procedure declares (sec. 2061, subd. 4) that 'the evidence of oral admissions of a party ought to be received with caution by a jury.' In Mattingly v. Pennie, 105 Cal. 514, this Court in bank said, 'No weaker kind of testimony could be produced.' Again in bank (Austin v. Wilcoxson, 149 Cal. 24) this Court has said: 'It is not stating it too strongly to say that evidence so given under such circumstances must appear to any Court to be in its nature the weakest and most unsatisfactory.'" (*Estate of Emerson,* 175 Cal. 724, 727.)

Our contention, therefore, under this subdivision is that hearsay evidence of a person long since deceased, coming from Hooper on cross-examination, uncorroborated in any way, but in fact positively contradicted, by testimony written and oral, together with a statement over the signature of Mrs. Kittredge in which she states positively, that the car was taken without her permission—this letter was refused in evidence (Tr. p. 65), is not sufficient evidence under the authorities to establish permission to use the automobile in question; and furthermore the pleadings in this case, as made by the appellees themselves, are not based upon any allegation of permission.

4. THAT THE EVIDENCE IS INSUFFICIENT TO ESTABLISH THE FACT THAT ROY HOOPER WAS OPERATING SAID AUTOMOMILE IN THE COURSE OF HIS EMPLOYMENT AS CHAUFFEUR FOR MRS. KITTREDGE AS ALLEGED IN THE COMPLAINT.

This is the allegation upon which the appellees base their action. There is not one single word in the entire evidence to the effect that Mrs. Kittredge asked Hooper to deliver a package for her to the Fairmont Hotel. Hooper goes no further than to testify that the nurse gave him a package but whether it was for Mrs. Kittredge or for the nurse or whether it was to be delivered to a friend of Mrs. Kittredge or of the nurse he will not state; he does not know the contents of the package, does not know to whom he delivered it, he received no receipt therefor; at one stage in his testimony, on cross-examination when he was asked concerning his leaving the ranch for San Francisco (Tr. p. 39), he describes his trip from the time he left the ranch to the time he arrived at the garage in San Francisco, leaving the machine there while he had his dinner and spent the evening at a theater, then returning to the garage from which place he took the machine to return home and not one single word was said by him concerning the delivery of a package until that matter was brought to his attention by a question.

This testimony as to the agency theory, as alleged in the complaint, is on a different basis from that of the permission theory set forth in the last subdivision. On the agency theory there is no attempt at all to prove that Hooper came to San Francisco to deliver a package for his employer, Mrs. Kittredge. In con-

nection with that failure of proof, consideration and weight must be given to his signed statement heretofore mentioned and to his statement made to Bargas concerning the taking of the automobile without the permission of Mrs. Kittredge.

The elements necessary to establish a cause of action on the grounds of *respondeat superior* are absolutely lacking.

Lane v. Bing, 202 Cal. 577;

Kish v. Calif. State Automobile Assn., 190 Cal. 246.

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5. INSTRUCTIONS GIVEN AND REFUSED.

Eight instructions were proposed by defendant. Of this number five were refused. (Tr. pp. 92-97.)

The instructions given by the Court are nine in number, of which numbers 1, 2 and 3 were proposed by defendant, number 7 proposed by plaintiffs, and the balance given by the Court. (Tr. pp. 94, 95 and 96.)

A party to an action is entitled to propose instructions presenting his theory of the case based upon the pleadings and proof. In the case of *Murero v. Rhinehart Lumber Company,* 85 Cal. App. 385, at 387, it was said:

> "Just as it was the duty of the court to instruct the jury giving all proper instructions supporting the theory of the plaintiff, it was equally the duty of the court to give to the jury all proper instructions supporting the theory of the defendant."

Instruction No. 5 given by the Court of its motion (Tr. p. 95), read as follows:

> "Under the provisions of the policy, plaintiff's claim to recovery is, first, that Hooper was driving the Buick car with the permission of the insured owned, and second, that the conditions of the policy with respect to suit were complied with."

We respectfully submit as pointed out above that the plaintiff's complaint was not based upon the theory of permission but was based upon the theory that Hooper was operating the car in the course of his employment. It is the contention of appellant that appellees failed to prove employment and that the question as to whether or not Hooper obtained the permission of Mrs. Kittredge was not the basis of the action. This instruction, therefore, should not have been given.

The same argument applies to instruction No. 8 given by the Court of its own motion. (Tr. p. 96.)

The same argument also applies to instruction No. 6 given by the Court of its own motion. (Tr. p. 95.)

Instruction No. 3 proposed by the appellant (Tr. p. 92) we believe, should have been given in view of the character of the evidence produced by the appellee. That instruction would have pointed out to the jury the necessity that the plaintiffs' evidence must be of greater weight, quality and convincing effect than that produced by the defendant and that if the plaintiffs failed to prove the allegations of their complaint by a preponderance of the evidence they can-

not recover. We believe the instruction should have been given under all the circumstances of this case.

Instruction No. 6 proposed by the appellant (Tr. p. 93)—appellant requested that the jury be instructed that if Hooper was operating the automobile without permission and was not operating it on the business or on behalf of Mrs. Kittredge then the plaintiffs could not recover.

This instruction was not given in substance anywhere. There is not one single instruction given to the jury which advised them that, following the allegations of the complaint, the plaintiff would have to prove that at the time of the accident Hooper was driving the automobile on the business of or on behalf of Mrs. Kittredge. This proposed instruction not only set forth the plaintiffs' theory of the case but also set forth the defendant's theory as alleged in the special defense in its amended answer. It should have been given.

Instruction No. 8 proposed by appellant (Tr. p. 93) was based upon the theory of appellant as set forth in its amended answer that Hooper had failed to cooperate and assist in the defense of the action brought against him. Nowhere in the instructions given by the Court is there a single word stated as to the necessity of cooperation and assistance as required by the terms of the policy on the part of Hooper.

Instruction No. 9 given by the Court (Tr. p. 96) covers the proposition of the delivery of process or summons or complaint to the insurance company but

does not contain a single word as to the necessity of cooperation and assistance in the defense of an action. We respectfully submit that the jury should have been instructed on this special defense which was pleaded by the appellant and in support of which evidence was introduced, uncontradicted.

Instruction No. 1 proposed by the appellant (Tr. p. 92) was for a directed verdict in favor of the appellant.

The correctness of any one of the foregoing contentions made by the appellant would require the giving of that directed verdict.

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6. THE APPELLANT SHOULD HAVE BEEN GRANTED PERMISSION TO INTERROGATE THE JURY AFTER THE DISCOVERY OF THE FACT THAT THE WIDOW HAD REMARRIED OR THAT A MISTRIAL SHOULD HAVE BEEN DIRECTED BY THE COURT.

From the record it is made to appear that Mrs. Forrest at the outset of the case and throughout its trial until she was called as a witness presented herself as the widow of Claude E. Forrest. No intimation was given that she had remarried and in fact she still maintained that her name was Belva Forrest when she was sworn as a witness on rebuttal and only after a series of questions did she divulge the fact that she had remarried, gave the name of her present husband and his occupation.

For aught that appears some of the jurymen might know the present husband or they might be connected in some way with the firm in which he is employed.

We believe that the appellant should have been given an opportunity then and there to interrogate the jury on this question, particularly when it was made to appear that the appellant had kept from everyone in the Court room the fact that she was remarried and the name, residence and occupation of her present husband. We do not believe under all of the circumstances that the penalty of a mistrial would be too severe.

Subdivisions 7 and 8 of the appellant's contentions concern the motion for a new trial and the motion made for a directed verdict. The points involved, we believe, have sufficiently been presented under the foregoing contentions.

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9. EXHIBIT "C" FOR IDENTIFICATION, REFUSED ADMISSION IN EVIDENCE.

Appellant offered in evidence a letter addressed to it on September 26, 1926, by Mary C. Kittredge.

Objection was made to its introduction and it was marked defendant's Exhibit "C" for identification. It was in the following words (Tr. pp. 64 and 65):

> "Saratoga, Sept. 26, 1926.
>
> Indemnity Insurance Co. of N. America
>
> Gentlemen:
>
> Referring to the accident in the early part of August when the unfortunate death of a pedestrian occurred through being hit by my Buick sedan while being driven by Roy Hooper, the fact is that the car was being used by him that night without my knowledge or permission. As I learned after the accident, he took the car

secretly and drove from Saratoga to San Francisco for his own private purposes entirely; and it was while he was on his way back to Saratoga in the early hours of the morning that the accident occurred. He was allowed to have Saturday nights free as a rule; and was in the habit of going those evenings to San Jose. For that purpose he had general permission to use a Ford runabout; but his express instructions were that he should never use the Buick sedan without first obtaining special permission. On the evening in question he took the car without permission, nor did I know that he had taken it until I was informed of the accident on the following day. Neither did I know of any intention on his part to go to San Francisco.

Mary Kittredge."

We contend that the Court erred in refusing to admit this letter in evidence. The record shows that the accident in question occurred on the 8th day of August, 1926; that the suit was commenced in San Mateo County on the 13th of October, 1926; that Mrs. Kittredge died on the 20th of October, 1926. The letter in question was written September 26, 1926, at a time when no lawsuit was pending against Mrs. Kittredge. It was written by Mrs. Kittredge in the performance of a duty specially required by her under the contract of insurance—namely, to report all accidents and give all information available, and it was made against her interest because in this notice to the insurance company, the appellant here, Mrs. Kittredge advised the company that Hooper had no permission to use the automobile in question. The insurance company therefore, under her own admis-

sion, would not have been obliged to indemnify her or protect her in an action where it was claimed that Hooper was using the car with her permission. The letter, therefore, was one made against her interests.

Certain writings and declarations made by a deceased person are admissible.

Section 1946, Code of Civil Procedure, provides:

> "Entries of decedents. Evidence in specified cases. The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, in the following cases:
>
> 1. When the entry was made against the interest of the person making it.
>
> 3. When it was made in the performance of a duty specially enjoined by law."

We contend that this letter written by Mrs. Kittredge was admissible under section 1 and section 3 of this code section. It was made against her interests and it was made in the performance of a duty imposed by law that is, imposed under the terms of this contract of insurance.

Section 1870, Code of Civil Procedure, provides:

> "Facts which may be proved on trial. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:
>
> 2. The act, declaration, or omission of a party, as evidence against such party;
>
> 7. The act, declaration, or omission forming part of a transaction, as explained in section eighteen hundred and fifty."

Section 1850, Code of Civil Procedure, referred to above, reads as follows:

> "Declarations which are a part of the transaction. Where, also, the declaration, act, or omission forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is evidence, as part of the transaction."

The fact in dispute here is the permission to use this automobile.

Section 1853, Code of Civil Procedure, provides:

> "Declaration of decedent evidence against his successors in interest. The declaration, act, or omission of a decedent, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest."

That Mrs. Kittredge had knowledge of the fact that no permission was given, there can be no doubt. This knowledge she imparted to her insurance carrier as required under the provisions of the policy and she did this at a time prior to the institution of any lawsuit.

Were she alive at the time of the trial her testimony would have been a complete answer to the faint evidence given by Hooper, and would have been corroborated and is corroborated by the signed statement of Hooper made himself the day following the accident to investigator Browne and his statement as to permission made to the gardener Bargas the morning after the accident.

We respectfully contend under this subdivision that defendant's exhibit "C" for identification should have been admitted in evidence. With that letter before the jury, with the signed statement of Hooper as to his actions in coming to San Francisco as given to investigator Browne and with his statement made to Bargas we contend the testimony of Hooper that this lady now deceased permitted him to use the automobile would be of no avail. That evidence of declarations of deceased persons coming from the unsupported testimony of a single person, as to a conversation between himself and the deceased person has time and again been characterized by the Courts as the weakest of all kinds of evidence. In this action we have the weakest kind of evidence, and if you please, given by deposition, and against this the sworn, positive evidence of two witnesses and two written documents disproving the alleged declaration of a deceased person.

Under the code sections in this state this letter written by Mrs. Kittredge in compliance with the requirements of her contract with the insurance company and against her interests should have been admitted in evidence.

Appellant respectfully asks that the judgment entered on the verdict be reversed.

Dated, San Francisco,
September 29, 1930.

HARTLEY F. PEART,
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